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Peter Rhodes Easley

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THE AIDS CRISIS IN PRISON: A NEED FOR CHANGE

Human Immunodeficiency Virus (HIV) and its fatal manifestation, acquired immunodeficiency syndrome (AIDS), are the greatest threat to public health in modern history.¹ This threat is especially critical in our prisons and correctional facilities due to the high number of inmates with AIDS,² rampant overcrowding, unsatisfactory medical care and the general lack of adequate response by prison officials.³ Without established procedures for dealing with prisoners with AIDS, proper medical facilities, and education

1. The Centers for Disease Control (CDC) had recorded 64,506 cases of AIDS as of June 6, 1988, and estimated that between 1 and 1.5 million Americans have been exposed to the AIDS virus. Watkins, REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, 2-3 (June 24, 1988) [hereinafter PRESIDENT'S REPORT]. This number increased to 82,764 reported cases by December 31, 1988. 38 MORBIDITY & MORTALITY WEEKLY REP. 230 (Apr. 14, 1989). This number is expected to rise to between 300,000 and 485,000 by 1991. GOV'T ACCOUNTING OFFICE, AIDS FORECASTING: UNDERCOUNT OF CASES AND LACK OF KEY DATA WEAKEN EXISTING ESTIMATES, REP. NO. PEMD-89-13, 83 (June 1989). Currently two strains of the virus have been isolated; HIV-I and HIV-II. See Hiltz, *First U.S. Case of Second Form of AIDS Reported*, Wash. Post, Jan. 28, 1988, at A9, col. 1.; U.S. Patient Found With Second Variety of AIDS Virus, N.Y. Times, Jan. 28, 1988, at A4, col. 4.

2. A joint study sponsored by the National Institute of Justice (NIJ) reported that as of October 1, 1987 there were 1,964 confirmed AIDS cases in local, state and federal correctional systems that responded to the study. This was a 156 percent increase in AIDS cases over a two year period since the NIJ's first study and a 59 percent increase since 1986. PRESIDENT'S REPORT, *supra* note 1, at 134. Other sources confirmed the NIJ finding. The National Prison Project (NPP) of the American Civil Liberties Union Foundation (ACLU) estimated in its 1988 survey that in state and federal prisons alone, the number of confirmed AIDS cases was as high as 1,650, a three hundred percent increase over their 1985 survey. Greenspan, *NPP Gathers Statistics on AIDS in Prison*, 17 NAT'L PRISON PROJECT J. 5 (1988) [hereinafter NPP STUDY]. In addition, it is estimated that of the 43,000 prisoners in New York, over 10,000 men or 25 percent have been exposed to the AIDS virus. *Aids in Prison* (National Public Radio broadcast, Nov. 22, 1988) (transcript available from National Public Radio) [hereinafter *Aids in Prison*]. These numbers have continued to rise. According to the most recent draft of the NIJ report, the number of confirmed AIDS cases had risen to 5,003. S. Moini & T.M. Hammett, *AIDS In Correctional Facilities: Issues and Options* 17 (Jan. 1990 draft) (available from Abt Associates, Inc., 55 Wheeler Street, Cambridge, Massachusetts 02138) [hereinafter NIJ Draft Study].

3. The President's Report lists lack of attention to the number and prevalence of HIV-infected prisoners, high cost of medical care, over-crowding and misinformation as "obstacles to progress" with regard to correctional facilities. PRESIDENT'S REPORT, *supra* note 1, at 134. This conclusion is more fully substantiated in a book compiled by the Yale Aids Law Project. H. DALTON, S. BURRIS & THE YALE AIDS LAW PROJECT, *AIDS AND THE LAW, A GUIDE FOR THE PUBLIC* 235-50 (1987) [hereinafter *AIDS AND THE LAW*].

programs for both inmates and correctional system staff, AIDS is likely to have an even more detrimental effect on prisoners than on society as a whole.

This Comment will begin with a general description of the magnitude of the AIDS problem in state and federal prisons. It will then analyze issues raised by mandatory testing of inmates for the AIDS virus including confidentiality, segregation, and medical treatment. The Comment will then assess current federal and state laws, policies, and protocols relating to testing, confidentiality and segregation, and medical treatment of seropositive prisoners and prisoners with AIDS. Finally, this Comment will assert the need for consistent policies for dealing with prisoners with AIDS.

I. SCOPE OF THE PROBLEM

A. *The Prison Setting*

Prison conditions have rapidly deteriorated over the last two decades to the point where serious health and safety hazards exist.⁴ Overcrowding as a result of longer sentences and tougher attitudes toward crime have certainly contributed to these problems.⁵ These conditions have also led to an increase in violence among prisoners and have added to the already difficult burdens facing correctional system staff.⁶ With tensions already high between inmates and staff, the AIDS epidemic will only fuel the fire.

The transmission of AIDS in prisons occurs primarily in one of two ways: exchanging bodily fluids during sexual contact or sharing needles during intravenous (IV) drug use.⁷ In two studies performed in 1985, the vast major-

4. In one case filed in California, it was alleged that the poor conditions in a state prison facility constituted a violation of the prisoner's eighth amendment right protecting them against cruel and unusual punishment. The complaint cited inadequate medical and psychiatric treatment. *Gates v. Deukmejian*, No. 87-1636 (E.D. Cal. July 27, 1988) (1988 U.S. Dist. LEXIS 9111). Overcrowding and violence have been common characteristics of state penal systems for years. Recently, the District of Columbia's Lorton prison facility has been besieged with overcrowding, drugs, and violence. *Wash. Post*, Jan. 23, 1989, at B1, col. 2. Fires are also not uncommon at the Lorton facility, where recently one prisoner died as the result of a fire set by fellow prisoners. *Wash. Post*, Jan. 21, 1989, at B1, col. 1. Even the Federal Bureau of Prisons has been accused of inhumane treatment of its inmates. See Cade, *Court Denounces Practices at Lexington Control Unit*, 17 NAT'L PRISON PROJECT J. 19 (1988).

5. As of 1986 the prison population in the United States exceeded 500,000 persons. The federal prison system is currently operating at 140 percent of its capacity while a majority of state prisons house two or more inmates in a cell designed for one. Jails, which are managed by cities and counties, have experienced a 40 percent increase in jail population between 1978 and 1983. It is not surprising that prisons and jails in more than thirty-seven states are now under court order to improve conditions. AIDS AND THE LAW, *supra* note 3, at 235-37.

6. *Id.*

7. *Id.* at 237-38.

ity of inmates with AIDS were or had been intravenous drug users.⁸ These studies offer a clear explanation as to how the AIDS virus is transported among the prison community. While IV drug use and sharing of needles may partially explain how AIDS is being spread among inmates, the most common transmission of the virus is the exchange of bodily fluids during sexual contact.⁹ It is indisputable that both consensual and coerced homosexual sex is a common occurrence in most, if not all, correctional facilities.¹⁰

B. Issues Relating to Prisoners with AIDS

The occurrence of AIDS in prisons has created a set of complex and yet to be resolved problems for both state and federal prison administrators.¹¹ These problems evolve from issues relating to (1) the testing of all existing and new prisoners for the AIDS virus;¹² (2) prisoners' needs that are "seropositive";¹³ and (3) the providing of adequate medical care for prisoners

8. *Id.* See also *NIJ Publishes Huge Manual on AIDS in Prisons and Jails*, CRIME CONTROL DIG., 3-5 (Feb. 24, 1986). The National Institute of Justice (NIJ) / American Correctional Association (ACA) study also found that over 70 percent of the AIDS cases were reported in prisons in New York, New Jersey, and Pennsylvania; while the ACLU National Prison Project (NPP) study found that over 85 percent of reported AIDS cases in state prisons occurred in New York, New Jersey, and Florida. It is argued that this geographical distribution supports the conclusion that a majority of the inmates with AIDS are IV drug users. AIDS AND THE LAW, *supra* note 3, at 237. The geographical incidence of AIDS in prison parallels the incidence of AIDS among the general public. According to the Centers for Disease Control, New York, New Jersey and Florida are listed among the ten American states with the highest incidence of AIDS. Wash. Post, Apr. 7, 1988, at A3, col. 2.

9. AIDS AND THE LAW, *supra* note 3, at 238. See also *HIV in Prison: Is Isolation Cruel or Prudent*, Wash. Post, Apr. 29, 1989, at A1, col. 1. For a general discussion of the AIDS crisis in prison, see Whitman, *Inside An AIDS Colony*, U.S. NEWS & WORLD REP., Jan. 29, 1990, at 20.

10. According to NPP, consensual sex and coerced sex are the most prevalent types of intercourse among inmates. Rape occurs in most prisons, however, due to the fact that prison administrators do not generally acknowledge that it occurs, exact data is not available. AIDS AND THE LAW, *supra* note 3, at 238.

11. A discussion and analysis of city and county jails is beyond the scope of this Comment, although many of the principles discussed herein apply to city and county jails with equal force.

12. In June 1987, the Federal Bureau of Prisons implemented a mandatory AIDS test for certain categories of inmates, including all "newly 'sentenced'" inmates. Memorandum by Robert L. Brutsche, M.D., Assistant Director Medical and Services Division, Federal Bureau of Prisons, (June 9, 1987) (available from NPP) [hereinafter Brutsche Memorandum]. This policy was later changed to include only prisoners who were being discharged or who were participating in community activities such as half-way house placements and furloughs. U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, OPERATIONS MEMORANDUM NO. 148-87(6100) (Oct. 30, 1987) [hereinafter FEDERAL BUREAU OF PRISONS MEMORANDUM].

13. Seropositivity refers to the "condition in which the presence of HIV antibody has been

with AIDS.¹⁴ These problems have been aggravated by the reactions of prison officials, guards, and other inmates.¹⁵

1. *Setting the Stage*

The response from prison administrators and their staff has been neither consistent nor compassionate. Moreover, a majority of states and the federal government have failed to recognize the existence and prevalence of AIDS in prisons.¹⁶ This lack of recognition coupled with fear and lack of knowledge about AIDS has led to some extremely unfair, and arguably unconstitutional, results.¹⁷ In many states, seropositive inmates have been confined to

confirmed by [a] . . . test. Persons seropositive for the AIDS virus have been exposed to the virus and are presumed to carry active viral particles." AIDS AND THE LAW *supra* note 3, at 363.

14. The Supreme Court has held that prisoners have a constitutional right to adequate medical attention. *Estelle v. Gamble*, 429 U.S. 97 (1976). *See also* *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Hutto v. Finney*, 473 U.S. 678 (1978).

15. Inmates in Maryland have filed a class action suit in the U.S. District Court which requests, among other things, that all prisoners be tested for the AIDS virus and that a list be available to the inmates and staff, of those inmates who have tested positive. *Hensley v. Hopkins*, No. JFM-88-823 (D. Md. amended complaint filed Oct. 28, 1988). *See also* *Jarrett v. Faulkner*, 662 F. Supp. 928 (S.D. Ind. 1987) and *LaRocca v. Dalsheim*, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (N.Y. Sup. Ct. 1983). In another case which was recently settled, the plaintiff, a prisoner in a state facility, describes the use of lists of suspected or known prisoners with AIDS or HIV infection by prison officials and the open identification by prison officials and guards of prisoners suspected of having AIDS. *Doe v. Meachum*, 126 F.R.D. 459, 1989 U.S. Dist. LEXIS 6913 (D. Conn. 1989) (consent decree).

16. PRESIDENT'S REPORT, *supra* note 1, at 134.

17. The NPP has received several reports of horrible conditions and extremely unfair treatment of seropositive inmates. AIDS AND THE LAW, *supra* note 3, at 241. A New York Times article describes the "horrifying" conditions at New York City's Riker's Island jail AIDS unit. Sullivan, *Surge in AIDS Cases Leading to Crisis in Prisons*, N.Y. Times, Mar. 5, 1987, at B1. In addition, a recent National Public Radio (NPR) report discussed the deplorable treatment of prisoners housed in state prisons in New York. Dr. Victoria Sharp of the Albany Medical Center, Albany, New York reported that generally prisoners are sent to the hospital for AIDS treatment when it is already too late. For instance, in one circumstance, a prisoner had progressed to the point where there were sores all over his body and had respiratory problems when he was sent to Dr. Sharp's clinic. He died three days later. In another case, a prisoner was bedridden in his cell for two weeks with what was later diagnosed as pneumocystis pneumonia before he was sent to Albany Medical Center for treatment. The prison officials told him that they would not let him see a doctor until they knew what was wrong with him. A staff attorney for the local legal aid society who was interviewed on NPR also described cases where prisoners had received inadequate treatment. In one case, a prisoner with fever spikes as high as 104 degrees was not sent to the hospital. Even prisoners in the prison infirmary do not receive adequate treatment, according to the attorney. Some have gone as long as several weeks without ever being diagnosed by a doctor. Another common problem in the treatment of prisoners with AIDS is the failure of local hospitals to provide adequate treatment or treatment at all. It is common for hospitals to refuse prisoners sent to them for AIDS treatment and in many instances prisoners have had to be transported to hospitals several hours away. In one case, a hospital was cited by the state department of health for

their cells under "twenty-three or twenty-four hour-a-day lock down conditions and denied access to law libraries, outdoor exercise, and educational, vocational and work-release programs."¹⁸ In addition, inmates have reported that guards and prison officials have ignored their requests for medical treatment and supplies.¹⁹ This treatment results in an inability to participate in programs that could reduce their period of incarceration. Such disparate treatment is also likely to seriously affect the prisoner's physical and mental condition and possibly impair their ability to fight the AIDS-related diseases.²⁰ Without proper counselling and education about AIDS, these conditions are only aggravated.²¹ These incidents of confinement, neglect and other disparate treatment strongly suggest discrimination against seropositive inmates and underscore the need for policies and laws which would ensure consistent and fair treatment of prisoners with AIDS.

2. Testing

Mandatory testing of prisoners is touted as the most effective means of determining the extent of the AIDS crisis in prisons.²² Countering this as-

a violation of the New York's Public Health Code because they failed to treat a prisoner who was sent to their emergency room. *AIDS in Prison*, *supra* note 2.

18. AIDS AND THE LAW, *supra* note 3, at 241. This deplorable treatment has led to several cases brought on constitutional grounds against correctional facilities. *See, e.g.*, *Farmer v. Levine*, No. HM 85-4284 (D. Md. amended complaint filed Mar. 6, 1986); *Woods v. White*, 689 F. Supp. 874 (W.D. Wis. 1988); *Cordero v. Coughlin*, 607 F. Supp. 9 (S.D.N.Y. 1984); *Doe v. California Dep't of Corrections*, No. V89-598 (C.D. Cal. filed Aug. 28, 1989); *Doe v. Evans*, No. 1:88-CIV-1752-MHS (N.D. Ga. filed Aug. 18, 1989) and *Harris v. Thigpen*, No. 87-V-1109, slip op. (M.D. Ala. Jan. 8, 1990) (1990 U.S. Dist. LEXIS 182).

19. In 1987 the ACLU filed a law suit against the California Department of Corrections demanding better medical care and improved hygiene at California's Vacaville facility for inmates with AIDS. *Gates v. Deukmejian*, No. CIV S-87-1636, slip op. (E.D. Cal. July 27, 1988) (1988 U.S. Dist. LEXIS 9111). *See also AIDS in Prison*, *supra* note 2.

20. Several papers and studies argue that proper counseling both before and after administering the AIDS test can decrease the level of depression in the patient being tested. Education regarding AIDS and its transmission and symptoms is also highly recommended by doctors and psychiatric professionals in an effort to stop the spread of the virus. E. Thompson & D. Wardrope, *An AIDS / ARC Support Group in a Correctional Institution: General and Specific Considerations* (unpublished paper available from NPP) [hereinafter *Support Group*]. *See also* S. Perry, L. Jacobsberg, B. Fishman, A. Frances, P. Weiler & B. Kaplan, *Psychological Responses to HIV Serological Testing* (available through S. Perry, M.D., 525 East 68th Street, New York, N.Y. 10021) [hereinafter *Psychological Responses*]; Frierson & Lippmann, *Management and Treatment of AIDS-Related Depression*, 2 *CLINICAL ADVANCES IN THE TREATMENT OF PSYCHIATRIC DISORDERS* 1 (Mar./Apr. 1988); *See also* Marzuk, Tierney, Tardiff, Gross, Morgan, Hsu & Mann, *Increased Risk of Suicide in Persons With AIDS*, 259 *J. A.M.A.* 1333 (Mar. 4, 1988).

21. For a discussion of the benefits of pre and post-test counseling, see *Support Group*, *supra* note 20 and *Psychological Responses*, *supra* note 20.

22. According to a survey performed by the NPP, all state prisons have some form of AIDS testing for prison inmates. Some states test prisoners when they are first sentenced and

sertion, critics of mandatory testing argue this testing would violate the constitutional rights of the prisoners and would likely result in a breach of their confidentiality.²³ Mandatory AIDS testing effects an individual's privacy interests at two stages. First, the forcible taking of a blood sample is intrusive and violative of the individual's bodily integrity.²⁴ Second, if test results are not kept confidential, stigmatization and discrimination could occur.²⁵ These factors demonstrate the inevitable conflict between the right to privacy and a desire to prevent the spread of the virus. Although the fourth amendment of the Constitution guarantees protection against unreasonable

some test when the inmate is released. Generally, if the inmate is suspected of having AIDS or AIDS Related Complex (ARC), he or she will be tested. *NPP Study*, *supra* note 2. Most states now use the Centers For Disease Control's (CDC) criteria to diagnose prisoners with AIDS and ARC. Under CDC's criteria, AIDS is an illness characterized by one or more of the following diseases: Candidiasis of the esophagus, throat or lungs; Herpes Simplex Virus; and Kaposi's Sarcoma. *Id.* at 7. On the other hand, a person with ARC is characterized as having a continuous fever, diarrhea or weight loss and a reduction in white blood cells known as "Helper T Cells." *Id.* The Federal Bureau of Prisons formerly tested each prisoner, but currently only tests prisoners who are allowed to go on furloughs and participate in community projects. Brutsche Memorandum, *supra* note 12; FEDERAL BUREAU OF PRISONS MEMORANDUM, *supra* note 12. See also *HIV in Prison: Is Isolation Cruel or Prudent?*, Wash. Post, Apr. 29, 1989, at A1, col. 1.

23. The NPP has consistently maintained that the testing and subsequent disparate treatment of inmates with AIDS by prison officials is unconstitutional because it violates their rights under the first, fourth, eighth and fourteenth amendments of the Constitution. In a recent complaint filed by the NPP on behalf of a class of prisoners in the Alabama state penal system, it is asserted that mandatory testing is a violation of the prisoner's fourth amendment rights because it is an unwarranted search and seizure. Complaint at 17, *Harris v. Thigpen*, No. 87-V-1109-N (M.D. Ala. Jan. 8, 1990). It is also asserted that the mandatory testing program violates the prisoner's right not to have personal matters collected and publicly disclosed in violation of the right of privacy under the fourteenth amendment. *Id.* at 18. Also, the subsequent automatic segregation of all prisoners who test positive on the HIV test without a hearing and without regard to appropriate classification factors denies the prisoners both substantive and procedural due process in violation of the fourteenth amendment. *Id.* The public disclosure of the prisoners' HIV positive test results, it is asserted, also violates the eighth amendment in that it causes wanton and unnecessary infliction of pain and is grossly disproportionate to the severity of the crimes committed by the plaintiffs. *Id.* Other critics of mandatory testing support the NPP's position. Dr. Robert L. Cohen, former director of the Montefiore Rikers Island Health Services in New York City, maintains that HIV antibody testing should not be performed in prison, but suggests a clinical evaluation on a case by case basis. *NPP Study*, *supra* note 2, at 7. Similarly, Dr. Dave Newton, Mississippi's State Department of Corrections Medical Director, spoke out against mandatory testing in a speech before the state's appropriations committee. *Id.* at 8. See also Greenspan, *HIV Infection among Prisoners*, 4 FOCUS 1 (May 1989) [hereinafter *HIV among Prisoners*].

24. See *Schmerber v. California*, 384 U.S. 757 (1966) (forcible taking of blood sample for blood alcohol test of driver). Currently there are two blood tests that are commonly used in prisons to determine whether an individual is producing antibodies to combat the AIDS virus: the ELISA test and the Western Blot test. *NPP Study*, *supra* note 2, at 7.

25. Several states currently segregate prisoners who are seropositive but not afflicted with any of the AIDS related complexes. See *NPP Study*, *supra* note 2.

searches and seizures,²⁶ the law regarding mandatory AIDS testing and the fourth amendment is unsettled,²⁷ especially in the prison context.²⁸ However, due to the strong parallel between AIDS testing and mandatory drug testing, the recent Supreme Court drug testing cases²⁹ will likely have a profound affect on the constitutionality of mandatory AIDS testing of prisoners.³⁰

In the drug testing context, courts in the past have balanced the individual's privacy right,³¹ including confidentiality, against the government's desire to identify drug use by its employees.³² This balancing approach was

26. The fourth amendment of the Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by the Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

27. One recent case held that a personnel policy requiring employees to submit to blood testing for AIDS and hepatitis B constituted an unreasonable search and seizure under the fourth amendment. *Glover v. E. Neb. Community Office of Retardation*, 867 F.2d 461 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 321 (1989). *But see* *Life Ins. Ass'n of Mass. v. Comm'r of Ins.*, 403 Mass. 410, 503 N.E.2d 168 (1988) (court allows insurance companies to test for AIDS when issuing life insurance).

28. In a recently decided case, the United States Court of Appeals for the Tenth Circuit held that a prisoner's fourth amendment rights were not violated when he was given a non-consensual AIDS test. *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989) (*per curiam*), *cert. denied*, 110 S. Ct. 871 (1990), *petition for reh'g filed* (Jan. 17, 1990). *See also* *Haywood County v. Hudson*, 740 S.W.2d 718 (Tenn. 1987) (court ruled that a prisoner must undergo an AIDS test despite constitutional objections). This issue is currently before other courts. *See Harris v. Thigpen*, No. 87-V-1109-N, slip op. (M.D. Ala. Jan. 8, 1990) (1990 U.S. Dist. LEXIS 182) (appeal filed Jan. 29, 1990) (the original complaint alleged that Alabama's mandatory testing statute for all state prisoners was unconstitutional). In a non-prison context, a case was filed in Pennsylvania maintaining that an unauthorized HIV test performed on a pre-marriage blood test was a violation of fourth amendment rights. *Doe v. Dyer-Goode*, 566 A.2d 889 (Pa. Super. Ct. 1989).

29. *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989) and *Skinner v. Railway Labor Executives Ass'n*, 109 S.Ct. 1402 (1989).

30. For example, the court in *Dunn*, 880 F.2d 1188 relied on *Skinner* and *Von Raab* in holding that mandatory AIDS testing of prisoners is constitutional.

31. *See* *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988) (court balanced employees' privacy interest with government's safety interest); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (court applied a balancing test between a public school's interest in the proper operation of its facility and the individual's privacy right). *See also* *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987); *National Fed'n of Fed. Employees v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988); *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987).

32. The government has maintained a variety of arguments in requiring drug tests of its employees. These arguments range from maintaining the safety of our railways, *see Railway Labor Executives Ass'n*, 839 F.2d at 577-78, to protecting national security *see National Fed'n of Federal Employees*, 818 F.2d at 937.

later adopted by the Supreme Court in two cases, *New Jersey v. T.L.O.*³³ and *O'Connor v. Ortega*,³⁴ and signaled a departure from the "probable cause" line of cases. The Court in *T.L.O.*, a non-testing case, explicitly adopted a reasonableness standard in determining whether a search and seizure was in violation of the fourth amendment. This adoption arguably weakened the probable cause test laid out in earlier cases.³⁵ In determining what is reasonable, the Court stated that all the circumstances must be taken into consideration.³⁶ The *O'Connor* Court followed this line of reasoning and also stated that it is necessary to balance the employee's privacy expectation and the government's need for "supervision, control and the efficient operation of the work place."³⁷

These interpretations of the fourth amendment were narrowed further by two recent drug testing cases. In *National Treasury Employees v. Von Raab*,³⁸ the Supreme Court held that the U.S. Custom Service's mandatory drug testing program was reasonable under the fourth amendment although it did not contain provisions requiring either reasonable suspicion or a warrant.³⁹ Although the Court affirmed that all fourth amendment searches must be reasonable, including urine tests,⁴⁰ it stated that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."⁴¹ Following this rationale, the Court stated that "where a Fourth Amendment intrusion serves special governmental needs . . . it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion."⁴² Applying this new interpretation to the Custom Service's drug testing program, the Court held that no warrant is necessary due to the fact that obtaining a warrant would "divert valuable agency resources" and "would provide little or nothing in the way of additional protection of personal privacy," since the Service's program defines narrowly and specifically the circumstances justifying testing.⁴³

33. 469 U.S. 325 (1985).

34. 480 U.S. 709 (1987).

35. 469 U.S. at 327.

36. *Id.* at 337.

37. 480 U.S. at 719-20.

38. 109 S.Ct. 1384 (1989).

39. *Id.* at 1397.

40. *Id.* at 1390.

41. *Id.*

42. *Id.*

43. *Id.* at 1390-91.

In *Skinner v. Railway Labor Executives Assn.*,⁴⁴ decided on the same day as *Von Raab*, the Court held that Federal Railroad Administration regulations requiring drug tests were constitutional.⁴⁵ Using reasoning similar to *Von Raab*, the Court maintained that "imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating the objectives of the Government's testing program."⁴⁶ The Court concluded that, in this context, there are "'special needs' beyond law enforcement that may justify departures from the usual warrant and probable-cause requirements."⁴⁷

The holdings in the drug testing cases have been extended by at least one court to cover mandatory AIDS testing of prisoners. The court in *Dunn v. White*⁴⁸ affirmed the dismissal of a prisoner's complaint which alleged that a non-consensual AIDS test was a violation of his fourth amendment rights.⁴⁹ The court's analysis focused on two issues: 1) whether the fourth amendment reasonableness standard was met; and 2) whether the prison regulation served a "legitimate penological purpose" as required by the Supreme Court's decision in *Turner v. Safley*.⁵⁰ The court, in finding that no warrant or probable cause requirements needed to be met in order to be reasonable under the fourth amendment, maintained that "the government's interest in the operation of a prison presents 'special needs' beyond law enforcement."⁵¹ The court also noted that a prisoner's privacy expectation "is further reduced by his incarceration."⁵²

Having found that the mandatory AIDS testing regulation did not violate the fourth amendment, the court held that the prison's "attempt to ascertain the extent of the [AIDS] problem is certainly a legitimate penological purpose."⁵³ The court refused to address the unreasonableness of "the manner

44. 109 S.Ct. 1402 (1989).

45. *Id.* at 1421.

46. *Id.* at 1416.

47. *Id.* at 1414 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). The Court also contrasted the taking of blood with the taking of urine by noting that blood tests are commonplace and generally less intrusive. *Id.* at 1417-18.

48. *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989).

49. *Id.* at 1197.

50. 482 U.S. 78 (1987). Under this decision, the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.

51. *Dunn*, 880 F.2d at 1194 (citing *Skinner*, 109 S.Ct. at 1414).

52. *Id.* at 1195. The court relied on *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) for its finding.

53. *Dunn*, 880 F.2d at 1195. It is interesting to note that the court recognized an "attempt to ascertain" although according to the facts the prison, after identifying the HIV positive inmates, "neither treated nor quarantined those prisoners." *Id.* at 1190. The court seems

or the place of the [AIDS] test," leaving open the possibility of future challenges focusing on this issue.⁵⁴ Since the *Dunn* opinion is the first to deal with mandatory AIDS testing in prisons, it is difficult to predict the outcome of similar cases pending in other jurisdictions.

One perplexing issue not firmly decided by courts is whether the prison officials have a duty to warn the general prison population that some of the inmates are seropositive. The issue of a duty to warn was substantiated in *Tarasoff v. Regents of the University of California*,⁵⁵ where the court held a psychologist liable in tort for failing to warn a third party whom was subsequently killed by his patient.⁵⁶ Although a complete analysis of this issue is beyond the scope of this Comment, the *Tarasoff* holding, if followed, could have a profound effect on mandatory AIDS testing in general.⁵⁷

3. Confidentiality

Confidentiality of AIDS test results is a fundamental necessity in protecting the privacy rights of the individual being tested. Just as confidentiality of medical records generally has been long recognized by public health officials and has been incorporated in most laws governing public health,⁵⁸ the need for confidentiality necessarily extends to the AIDS testing context.⁵⁹ This is particularly true when mandatory AIDS testing is instituted in the prison context due to the disparate treatment of prisoners with AIDS.

Confidentiality of test results is an essential element of any mandatory testing program since it is one of the most difficult legal issues associated with AIDS testing and arguably the area where the greatest amount of abuse could and does occur in the prison setting.⁶⁰ Whether the AIDS test is

to be saying that any penological purpose, whether implemented or not, will be considered legitimate.

54. *Id.* at 1197. The court refused to address this issue due to the fact that the plaintiff did not adequately assert that the test was unreasonable. *Id.* For a discussion of the basis of this type of challenge, see *Bell v. Wolfish*, 441 U.S. at 559.

55. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

56. *Id.* at 450, 551 P.2d at 352, 131 Cal. Rptr. at 32.

57. For a more thorough discussion of *Tarasoff*, see McCarty, *Patient Threats Against Third Parties: The Psychotherapist's Duty of Reasonable Care*, 5 J. CONTEMP. HEALTH L. & POL'Y 119 (1989). Another perplexing issue is whether the prison is required to protect inmates with AIDS from fellow inmates. At least one court answered this in the affirmative. See *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988).

58. *Whalen v. Roe*, 429 U.S. 589, 605 (1976). See also AIDS AND THE LAW, *supra* note 3, at 55.

59. See Philipson & Wood, AIDS, Testing, and Privacy: An Analysis of Case Histories (1987) (available from the AIDS Legal Referral Panel, 1663 Mission Street, Suite 400, San Francisco, CA 94103) (discussing case studies of failure to keep HIV antibody test results confidential in violation of California law).

60. In a recent incident, a woman was convicted of a felony and sentenced to two years in

administered to all prisoners or just to select groups of individuals, the need for confidentiality of their test results is the same. Many states currently segregate prisoners who are merely seropositive but not infected with an AIDS related disease.⁶¹ This raises several issues, including whether segregating seropositive prisoners and housing them with prisoners with AIDS or ARC is unconstitutional from an eighth amendment standpoint.⁶² This theory is currently being tested in several pending cases throughout the nation.⁶³

jail. The county where she was arraigned did not have space in their local jail to keep her so she was sent to a neighboring county jail. When she was admitted to the facility, she was given a blood test without her consent and against her will. After the blood test was administered, the inmate was housed in isolation. The sheriff later told her that she had AIDS, although in fact her body was only producing antibodies and did not in fact have AIDS or ARC. At her hearing, a local newspaper reporter was present when the Judge suspended the rest of her sentence and released her from confinement. The hearing and the circumstances leading up to her confinement were later reported in the local newspapers. See *AIDS Victim Released*, Easton Star Democrat, Aug. 13, 1987 at 1a, col. 1; *Judge May be Sued In AIDS Case*, Easton Star Democrat, Aug. 28, 1987 at col. 1. This is not the first incident of breaches of confidentiality in the prison context. See *Doe v. Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988); *Rodriguez v. Coughlin*, No. CIV-87-1577E, slip op. (W.D.N.Y. June 2, 1989) (1989 U.S. Dist. LEXIS 15898); *Woods v. White*, 689 F. Supp. 874 (W.D. Wis. 1988). For a cases relating to confidentiality abuses of AIDS testing outside of the prison setting, see *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675 (Tex. Ct. App. 1987); *Doe v. Borough of Barrington*, No. Civ. 88-2642, slip op. (D.N.J. Jan. 29, 1990) (1990 U.S. Dist. LEXIS 1059). See also Levy, *The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome — AIDS* 37 EMORY L.J. 217 (1988).

61. The NPP study conducted in 1988 indicated that at least ten states (Alabama, Arizona, California, Colorado, Georgia, Nevada, New Hampshire, Oregon, Tennessee, and Wisconsin) housed seropositive prisoners with those prisoners who have AIDS and ARC. *NPP Study*, *supra* note 2, at 8. The current trend, however, seems to be moving toward mainstreaming HIV-infected prisoners. According to the NPP, four of the original states (Arizona, South Dakota, Tennessee, and Wyoming) have recently reversed their policy of segregating seropositive prisoners. Greenspan, *States Move Toward Mainstreaming of HIV-infected Prisoners*, 22 NAT'L PRISON PROJECT J. 18 (1990) [hereinafter *Mainstreaming*]. Prison administrators point to three reasons for reversing previous policies: "1) recently filed lawsuits, 2) the high cost of keeping those prisoners segregated, and 3) updated medical information." *Id.*

62. The eighth amendment of the Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. XIV.

63. The ACLU is appealing a decision in a case it filed on behalf of a class of seropositive prisoners in Alabama state prison facilities alleging violations of the eighth amendment. *Harris v. Thigpen*, No. 87-V-1109-N, slip op. (M.D. Ala. Jan. 8, 1990) (1990 U.S. Dist. LEXIS 182) (appeal filed Jan. 29, 1990). Other pending cases include: *Doe v. California Dep't of Corrections*, No. V89-598 (C.D. Cal. filed Aug. 28, 1989); *Doe v. Evans*, No. 1:88-CIV-1752-MHS (N.D. Ga. filed Aug. 18, 1989); *Macke v. Cowles*, No. 86-4447-CV-C-5 (W.D. Mo. filed Apr. 26, 1988). Cases which have been decided include: *Doe v. Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988) (court issued a preliminary injunction preventing the New York Department of Correctional Services from involuntarily transferring prisoners who are HIV positive); *Telepro v. Fauver*, No. 85-1742, slip op. (D.N.J. Jan. 9, 1989) (court dismissed prisoners complaint which alleged eighth amendment violations); *Baez v. Rapping*, 680 F. Supp. 112

In one recent case, the State of Connecticut settled a law suit which challenged its policy of segregating all HIV positive inmates.⁶⁴ The settlement, which is heralded as landmark, covers such issues as housing, temperature, visitation, laundry and cleaning services, and nutrition.⁶⁵ In another important case, *Harris v. Thigpen*, the American Civil Liberties Union (ACLU) is challenging Alabama's policy requiring all prisoners who are seropositive, regardless of whether they have AIDS or not, to be housed in separate facilities.⁶⁶ Specifically, the complaint alleged that the public disclosure of test results and the consequences of disclosure constitute cruel and unusual punishment and thus violate the eighth amendment.⁶⁷ In a decision issued January 8, 1990, the court held that Alabama's testing program "does not amount to an unreasonable search and seizure or an invasion of a constitutionally protected privacy."⁶⁸ This decision has been appealed by the ACLU. Whether or not this law suit is successful, confidentiality of test results is an issue which prison administrators and staff must address when instituting a testing program.

4. Medical Attention

The most horrible manifestation of the AIDS crisis in the federal and state prison systems is the lack of adequate and proper medical care for prisoners inflicted with AIDS.⁶⁹ The Supreme Court in several decisions has held that prisoners have a constitutional right to adequate prison facilities and medical care.⁷⁰ Prison facilities are adequate if they (1) meet minimal living standards and provide adequate food, clothing, shelter and medical, dental

(S.D.N.Y. 1988) (court granted summary judgement in favor of prison medical staff where prisoner alleged eighth amendment violations); *Cordero v. Coughlin*, 607 F. Supp. 9 (S.D.N.Y. 1984) (prison officials not required to give prisoners with AIDS same privileges provided to other prisoners); *Judd v. Packard*, 669 F. Supp. 741 (D. Md. 1987) (civil rights of prisoner with AIDS not violated by placing him in medical isolation). In addition to these reported decisions, there have also been at least three settlements in cases involving prisoners with AIDS alleging constitutional violations: *Doe v. Meachum*, 126 F.R.D. 459, 1989 U.S. Dist. LEXIS 6913 (D. Conn. 1989) (consent decree); *Ramos v. Lamm*, No. 77-C-1093 (D. Col. filed Mar. 28, 1989) (proposed consent decree filed); *Smith v. Meachum*, No. H-87-221 (D. Conn. Aug. 8, 1989) (consent decree).

64. See *Smith v. Meachum*, No. H-87-221 (D. Conn. Aug. 8, 1989) (consent decree).

65. *Id.* at 2.

66. Complaint at 11, *Harris v. Thigpen*, No. 87-V-1109-N, slip op. (M.D. Ala. Jan. 8, 1990) (1990 U.S. Dist. LEXIS 182) (appeal filed Jan. 29, 1990).

67. *Id.* at 20.

68. *Harris v. Thigpen*, No. 87-V-1109-N, slip op. at 48-49 (M.D. Ala. Jan. 8, 1990) (1990 U.S. Dist. LEXIS 182) (appeal filed Jan. 29, 1990).

69. For example, according to a 1986 study, inmates with AIDS housed in New York state correctional facilities live only half as long as people with AIDS living outside of prisons. *HIV among Prisoners*, *supra* note 23, at 2.

70. See *AIDS and the Law*, *supra* note 3, at 236.

and psychiatric care,⁷¹ (2) allow prisoners to communicate and visit with loved ones, observe their religions, partake in physical exercise, protest prison conditions, and to have access to the courts,⁷² (3) maintain an adequate staff to protect against violence,⁷³ and (4) are fair in all decisions which affect their operation, including staff members, discipline, and inmate classification.⁷⁴

As might be expected, prisoners with AIDS have filed several cases alleging that they were not receiving proper medical care.⁷⁵ Although many of these cases are pending, AIDS in prison will have a dramatic affect on the need for better prison medical facilities for prisoners with AIDS.

II. THE STATES' RESPONSE: LAWS AND POLICIES RELATING TO AIDS AND PRISONERS

State legislatures have responded slowly to the AIDS crisis in prisons. Some states have passed laws that require the mandatory testing of inmates,⁷⁶ while other states have failed to respond entirely. More common, however, are the policies and guidelines that have been compiled by the state divisions of corrections that purport to provide guidelines regarding AIDS testing, segregation, and confidentiality.

A. A Roundup of State Policies and Protocols

The National Prison Project (NPP) of the ACLU has compiled three surveys of state policies regarding prisoners with AIDS.⁷⁷ The most recent

71. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976).

72. See, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977); *Pell v. Procunier*, 417 U.S. 817 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Cruz v. Beto*, 405 U.S. 319 (1972).

73. See, e.g., *Whitley v. Albers*, 475 U.S. 312 (1986); *Smith v. Wade*, 461 U.S. 30 (1983).

74. See, e.g., *Hewitt v. Helms*, 459 U.S. 460 (1983); *Wolff v. McDonnell*, 418 U.S. 539 (1974).

75. See *Gates v. Deukmejian*, S-87-1636, slip op. (E.D. Cal. July 27, 1988) (1988 U.S. Dist. LEXIS 9111); *Gomez v. United States*, 725 F. Supp. 526 (S.D. Fla. 1989) (appeal filed); *Harris v. Thigpen*, No. 87-V-1109-N (M.D. Ala. Jan. 8, 1990) (1990 U.S. Dist. LEXIS 182) (appeal filed Jan. 29, 1990); *Hawley v. Evans*, 716 F. Supp. 601 (N.D. Ga. 1989); *McDuffie v. Rikers Island Medical Dep't*, 668 F. Supp. 328 (S.D.N.Y. 1987).

76. For example, the Alabama legislature has passed a statute that requires the mandatory testing of all prisoners for AIDS. 1987 Ala. Acts 574.

77. The first survey was reported in NPP's Winter 1985 Journal. It indicated that many states did not have actual policies regarding testing, confidentiality, segregation, and medical treatment. Further, several states had no cases of reported AIDS in their prison system. *NPP Gathers the Facts on AIDS in Prison*, 6 NAT'L PRISON PROJECT J. 1 (1985). The second survey updated the first and indicated a large increase in the number of prisoners with AIDS and a larger number of states with formal policies with regard to dealing with prisoners with AIDS. *NPP Study*, *supra* note 2, at 7. In addition, NPP conducted a telephone survey in 1989 to

survey indicates a sharp increase in the number of prisoners that are seropositive and inflicted with AIDS and a larger number of states with AIDS policies.⁷⁸ This section will focus on the data obtained from this most recent survey with regard to testing of prisoners for the AIDS HIV-I virus, confidentiality of AIDS test results, segregation of prisoners who are seropositive and who have AIDS, and medical treatment and facilities for prisoners with AIDS.

Testing of prisoners is performed by virtually all states in one form or another. The 1988 NPP Survey indicated that twelve states performed AIDS tests on all prisoners who enter their prison facility.⁷⁹ This number increased to seventeen by 1989.⁸⁰ Of the original twelve states, four also tested on exit from the prison facility.⁸¹ Several states test only those prisoners who are considered high risk.⁸² All but eight states test symptomatic prisoners to confirm diagnosis.⁸³ Of these states, twenty-nine states use two ELISA (Enzyme Linked Immuno-Sorbent Assay) tests and confirm the results with a Western Blot test, which tests for antibodies produced by the body against the proteins that make up the HIV-I virus.⁸⁴ Seventeen states use only one ELISA test with a confirmatory Western Blot test, as recommended by the Centers For Disease Control (CDC).⁸⁵

The prevalence of mandatory testing underscores the strong need for strict confidentiality standards governing the test results. The NPP survey, however, indicates that over half of the states reported that they release the HIV status of prisoners to both medical staff and the warden or superintendent of

update its previous survey results. Greenspan, *Increase in Mandatory Testing*, 22 NAT'L PRISON PROJECT J. 18 (1990) [hereinafter *Update*].

78. *NPP Study*, *supra* note 2, at 7. This trend is confirmed by the recent NIJ draft study. NIJ Draft Study, *supra* note 2.

79. Those states include: Alabama, Colorado, Georgia, Idaho, Iowa, Missouri, Nevada, New Hampshire, New Mexico, Oklahoma, South Dakota, and West Virginia. *NPP Study*, *supra* note 2, at 6. In addition, Arizona, Oregon, and Louisiana have proposed legislation which if passed would institute mandatory testing of all prisoners upon entry into the prison facility. *Id.* at 7-8.

80. According to the 1989 update, Michigan, Mississippi, Nebraska, North Dakota, Rhode Island, Utah, and Wyoming had been added to the list of states that test mandatorily, while New Mexico was deleted from the list. *Update*, *supra* note 77.

81. Those states include: Alabama, Idaho, New Hampshire, and West Virginia. A fifth state that also tests on exit is Mississippi. *NPP Study*, *supra* note 2, at 6.

82. Those states that test high risk prisoners include: Alaska, Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Michigan, Mississippi, Montana, New York, North Dakota, Texas, Virginia, and Washington. *Id.*

83. Those states that do not test to confirm diagnosis include: Alabama (but they test all prisoners without regard to symptoms), Florida, Illinois, Missouri, Nebraska, New Hampshire, Rhode Island, and Wyoming. *Id.*

84. *Id.* at 7.

85. *Id.*

the prison.⁸⁶ In addition, the survey indicates that at least eight prisons give information regarding a prisoner's HIV status to correctional staff. In one ironic situation, Nevada decided to give its corrections officers a list of all prisoners who tested positive when the officers threatened to strike despite a study by the Nevada Attorney General's office that maintained that such a disclosure would violate the state's confidentiality laws.⁸⁷ Wisconsin, on the other hand, has recognized the need for confidentiality of test results and has instituted strict guidelines that allow for the release of medical information on a "need to know" only basis.⁸⁸ The policy also provides for civil and criminal penalties if test information is released intentionally or due to negligence.⁸⁹ Unfortunately, this policy, considered the best in the country by the NPP, is not indicative of any trend. Of the states that have some type of policy regarding confidentiality, most are not enforced or lack the type of deterrent penalties found in the Wisconsin policy.⁹⁰

Segregation of seropositive prisoners and prisoners with AIDS, a common practice by state correctional facilities, highlights the need for adequate medical facilities and proper standards as to when a transfer outside of the general prison community is necessary and proper. In 1988, ten states

86. *Id.* at 8.

87. *Id.*

88. Wisconsin Dep't of Health and Social Services, AIDS Case and HTLV-III Antibody Test Reporting (May 1986). Generally, this means that only medical staff may have access to test results unless the prisoner consents in writing to releasing the test information to other staff personnel. *Id.*

89. *Id.*

90. For example, the Texas Department of Corrections instituted a policy that states that test results are released on a need to know basis with approval from the warden. However, when surveyed by the NPP, they stated that parole officers are routinely given test information. See Texas Department of Corrections Administrative Directive, AD-6.00, 4 (June 26, 1987). Other states with high numbers of prisoners also lack adequate confidentiality policies. Florida, although it lacks a formal policy regarding prisoners with AIDS, would allow the release of test results to officers of the court, the legislature, the Parole and Probation Commission, the Department of Corrections, and public law enforcement agencies under its current confidentiality laws. FLA. STAT. § 945.10 (1988). New Jersey, although also lacking a formal policy on prisoners with AIDS and confidentiality of test results, responded to the NPP survey and stated that only inmates and the medical staff are privy to test results. NPP Survey On AIDS Among Prisoners — 1987 [hereinafter *NPP Survey*], response of New Jersey Department of Corrections (Nov. 23, 1987) (available from NPP). New York, pursuant to a directive from the Department of Corrections, is required to share medical information including test results with Division of Parole employees. Memorandum to All Superintendents from J.W. Hernandez-Cuebas and Dr. Raymond Broadus (Sept. 23, 1987) (available from the State of New York, Department of Correctional Services, the State Office Building Campus, Albany, New York 12226). The California Department of Corrections also lacks formal policies regarding testing and confidentiality, but responded to the NPP survey that only the prisoner and the medical staff are given the test result information. *NPP Survey*, response of the California Department of Corrections (Dec. 14, 1987) (available from the NPP).

segregated all seropositive prisoners,⁹¹ while six states and the District of Columbia segregated only those prisoners with AIDS or ARC.⁹² The trend, however, seems to be toward mainstreaming seropositive prisoners. In the last year, four states reversed their segregation policy and currently mainstream seropositive prisoners.⁹³ The majority of the remaining states segregate prisoners that meet the definition of AIDS.⁹⁴ In those states where prisoners are segregated from the general prison population, some are transferred to special AIDS medical facilities, while others are simply put in an AIDS ward within the prison facility.⁹⁵

The high incidence of segregation indicates a desire by the states to curtail the spread of the disease while attempting to provide proper medical care. This desire is not without its price. States that segregate prisoners diagnosed as merely seropositive severely and unnecessarily curtail the activities of otherwise healthy prisoners by often denying them access to the facilities available to other inmates. Several states surveyed by the NPP responded that prisoners with AIDS are denied contact visits with family, law library use, educational programs, vocational programs, a chance to earn good time credits or incentive pay, outdoor exercise, use of gym or recreational facili-

91. Those states include: Alabama, Arizona, California, Colorado, Georgia, Nevada, New Hampshire, Oregon, Tennessee, and Wyoming. *NPP Study*, *supra* note 2, at 6.

92. Those states include: District of Columbia, Maine, Mississippi, Oklahoma, South Dakota, Texas, and Wisconsin. *Id.*

93. Those states include: Arizona, South Dakota, Tennessee, and Wyoming. *Mainstreaming*, *supra* note 61.

94. Those states include: Alaska, Connecticut, Florida, Indiana, Maryland, Massachusetts, Montana, Nebraska, New Jersey, New York, North Dakota, Pennsylvania, Virginia, and West Virginia. *Id.*

95. Alabama, for example, houses all inmates with AIDS in a "separate dorm" and those inmates are transferred to a community hospital if they are acutely ill. *NPP Survey*, response of the Alabama Department of Corrections (Nov. 13, 1987) (available from the NPP). Connecticut has separate facilities for its prisoners with AIDS and gives them a private room until they need hospitalization. *NPP Survey*, response of the Connecticut Department of Corrections (Dec. 14, 1987) (available from the NPP). Georgia has a correctional medical unit that houses both its prisoners with AIDS and those that are just seropositive. *NPP Survey*, response of the Georgia Department of Corrections (Sept. 1987) (available from the NPP). California has a similar policy. *NPP Survey*, response of the California Department of Corrections (Dec. 14, 1987) (available from the NPP). New Jersey has a policy of segregating those inmates with AIDS to either a medical center or special medical unit. *NPP Survey*, response of the New Jersey Department of Corrections (Nov. 23, 1987) (available from the NPP). North Carolina also has a prison hospital where inmates with AIDS are housed. *NPP Survey*, response of the North Carolina Department of Corrections (Nov. 30, 1987) (available from the NPP). Texas and New York, on the other hand, do not separately house prisoners with AIDS, except for those that require special medical attention. *NPP Survey*, responses of the Texas Department of Corrections (Sept. 1987) and the State of New York Department of Correctional Services (Dec. 2, 1987) (both available from the NPP).

ties, and mental health counseling.⁹⁶ Seropositive prisoners, on the other hand, are usually not formally restricted as to the use of facilities, however there may be a de facto restriction in those states where such prisoners are segregated from the general prison population.

Another medical issue concerning prisoners with AIDS is the quality and availability of adequate medical care. Although adequacy of medical care is often difficult to ascertain, one form of measuring it is the availability of the drug Aziothymidine or AZT, which is one of the known drugs believed to inhibit the spread of the AIDS virus.⁹⁷ Currently, only twenty-six states make AZT available to prisoners with AIDS.⁹⁸ This relatively poor record is enhanced by allegations by the press of subpar treatment and court cases filed by inmates requesting better treatment.⁹⁹ Moreover, the states' current inability to provide adequate medical care will be aggravated by the ever increasing number of prisoners contracting AIDS.

96. For example, the Virginia Department of Corrections denies prisoners with AIDS access to educational programs, vocational programs, and the use of a gym or recreational facilities. *NPP Survey*, response of the Virginia Department of Corrections (Sept. 1987) (available from the NPP). Other states have similar restrictions. The North Carolina Department of Corrections denies its AIDS infected prisoners educational programs, vocational programs, a chance to earn good time credits or incentive pay, outdoor exercise, use of gym or recreational facilities, and mental health counseling. *NPP Survey*, response of the North Carolina Department of Corrections (Nov. 30, 1987) (available from the NPP). Texas Department of Corrections also limits the use of facilities by prisoners with AIDS to contact visits and mental health counseling. *NPP Survey*, response of the Texas Department of Corrections (Sept. 1987) (available from the NPP). New Jersey similarly does not allow prisoners with AIDS to use the law library, gym, or recreational facilities. *NPP Survey*, response of the New Jersey Department of Corrections (Nov. 23, 1987) (available from the NPP). Some states have not addressed these issues. New Mexico, for example, has not written a formal set of procedures as to how to deal with seropositive prisoners and prisoners with AIDS. *NPP Survey*, response of the New Mexico Corrections Department (Sept. 1987) (available from the NPP). Other states like New York, California, Oregon, Washington, South Carolina, and Alabama do not have formal policies that explicitly limit the use of facilities by prisoners with AIDS.

97. See *AIDS and the Law*, *supra* note 3, at 361; *AZT Found to Delay Onset of AIDS; Treatment Urged for Up to 650,000*, Wash. Post, Aug. 18, 1989, at A1, col. 3.

98. The states that do not offer AZT are: Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Dakota (they currently report no seropositive or AIDS inmates), Ohio, Oklahoma, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin. *NPP Study*, *supra* note 2, at 6.

99. See *Aids Inmates Get Poor Care, Report Says*, N.Y. Times, May 13, 1988, at B1, col. 2; *Harris v. Thigpen*, No. 87-V-1109-N, slip op. (M.D. Ala. Jan. 8, 1990) (1990 U.S. Dist. LEXIS 182) (appeal filed Jan. 29, 1990); *Gates v. Deukmejian*, No. S-87-1636, slip op. (E.D. Cal. July 27, 1988) (1988 U.S. Dist. LEXIS 9111); *Macke v. Cowles*, No. 86-4447-CV-C-5 (W.D. Mo. filed Apr. 26, 1988).

III. THE NEED FOR CHANGE

The AIDS crisis in the nation's prisons indicates a need for consistent, thoughtful, and fair policies to ensure that constitutional mandates are met while remaining within the boundaries of humane treatment. Although it is beyond the scope of this Comment to discuss proposed reforms for each individual state, every proposal should discuss testing, medical treatment and diagnosis, segregation, and education. States that currently have policies, whether formal or informal, should reevaluate them in light of these issues. States that currently do not have formal policies should use this list of issues to help formulate their policies.

IV. CONCLUSION

The reaction by the state departments of correction to the ever growing problem of AIDS in prison necessitates a consistent approach regarding AIDS testing, confidentiality of medical records, and the treatment of inmates. State policies must begin addressing the legality and fairness of mandatory testing of all prisoners as compared with a voluntary testing program. In addition, states should be more concerned with maintaining the confidentiality of medical records and test results so as to not stigmatize those prisoners who test positive. In drafting segregation policies, correctional administrators must consider the importance of allowing family visits, access to recreational facilities, and counseling. Medical treatment must be sufficiently reformed to insure proper treatment and adequate care. Lastly, it is critical that correctional officers, medical staff, and inmates be exposed to intensive educational programs to help them learn the facts and fiction about AIDS. These educational programs should present the issues accurately without attempting to sensationalize the AIDS problem. Without an extensive educational program, AIDS will continue to spread rapidly within prison systems across the country.

Peter Rhodes Easley